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**In the Matter of**

**Rulemaking to Amend Parts 1, 2, 21 and 25  
of the Commission's Rules to Redesignate  
the 27.5-29.5 GHZ Frequency Band, to  
Reallocate the 29.5-30.0 GHZ Frequency Band,  
to Establish Rules and Policies for Local  
Multipoint Distribution Service and for  
Fixed Satellite Services**

CC Docket No. 92-297

## REPLY COMMENTS OF THE RURAL TELECOMMUNICATIONS GROUP

The Rural Telecommunications Group ("RTG"),<sup>1</sup> by its attorneys, respectfully submits these Reply Comments in response to Comments filed pursuant to the *Fifth Notice of Proposed Rulemaking* ("FNPRM"), accompanying the *Second Report and Order and Order on Reconsideration* ("Second R&O") released by the Federal Communications Commission ("FCC" or "Commission") on March 13, 1997, in CC Docket No. 92-297. RTG particularly responds to the arguments of WebCel Communications, Inc. ("WebCel").

WebCel filed “comments” in which it asks the Commission to “re-examine” local exchange carrier (“LEC”) eligibility to participate in the Local Multipoint Distribution Services (“LMDS”) auction in light of the Commission’s decision to allow geographic partitioning and spectrum disaggregation of LMDS licenses. WebCel at 14. WebCel argues that incumbent

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<sup>1</sup> RTG is a group of concerned rural telephone companies who have joined together to promote the efforts of member rural telephone companies to speed the delivery of new, efficient and innovative telecommunications technologies to the populations of remote and underserved sections of the country.

LECs can use partitioning and disaggregation to acquire LMDS licenses to serve areas outside their wireline service areas, so called "out-of-region" areas, and accordingly, that an incumbent LEC should not be allowed to participate in an LMDS auction for any Basic Trading Area ("BTA") which significantly overlaps the LEC's wireline service area (so called "in-region BTAs or areas"), even if the LEC commits to divesting the area of significant overlap. WebCel at 14.

As discussed below, WebCel's Comments constitute an improper petition for reconsideration, and are therefore beyond the scope of the *FNPRM*. However, should the Commission nonetheless choose to consider WebCel's Comments, RTG strongly opposes WebCel's contention that rural telephone companies will be able to provide LMDS service to rural areas through non-auction means. Only through auction participation, will rural telephone companies be afforded the opportunity to provide LMDS to rural areas as required by law.

#### **I. WebCel's Comments Are Beyond the Scope of the *FNPRM*.**

The *FNPRM* raises issues regarding the proper administration of the Commission's decision to allow partitioning and disaggregation. The Commission requested comment on such issues as the proper performance requirements for partitioned areas and whether to apply unjust enrichment provisions to partitioning deals. *See Second R&O* at ¶¶ 416, 420. The *FNPRM* did *not* invite reconsideration of LEC eligibility, as the Commission decided that issue in the *Second R&O*. *Id.* at ¶ 160.

Accordingly, to the extent that WebCel asks the Commission to re-examine its decision to permit rural telephone companies and other incumbent LECs to bid on in-region BTAs, WebCel's pleading is an improperly styled petition for reconsideration. As a petition for

reconsideration, WebCel's pleading would need to be placed on public notice so that interested parties were apprised of its content and could oppose WebCel's arguments. *See* 47 C.F.R. § 1.429(e).<sup>2</sup> WebCel's pleading is not a petition for reconsideration in proper form, however, and WebCel's request for a re-examination of the eligibility issues should not be considered. However, should the Commission choose to consider WebCel's allegations in the context of the *FNPRM*, RTG offers the following opposition.

## **II. Rural Telephone Companies Must Be Afforded an Opportunity to Acquire LMDS Spectrum Through the Auction Process.**

RTG opposes any limitations on LEC eligibility to acquire LMDS licenses through the auction process, and strenuously opposes any limitation on rural telephone company eligibility in particular.<sup>3</sup> To the extent, however, that the Commission imposes short-term, in-region eligibility restrictions on rural telephone companies and other LECs, the Commission should maintain its current policy of allowing rural telephone companies and other LECs to participate in the LMDS auction subject to divestiture of any overlapping areas within 90 days. *See Second R&O* at ¶ 194. By allowing rural telephone companies to participate fully in the LMDS auctions the Commission will provide rural telephone companies an opportunity to acquire spectrum to expand their service areas and to introduce new services and competition to adjacent rural and

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<sup>2</sup> Section 1.429(e) of the Commission's Rules states:

When a petition for reconsideration is timely filed in proper form, public notice of its filing is published in the *FEDERAL REGISTER*. The time for filing oppositions to the petition runs from the date of public notice.

<sup>3</sup> RTG's opposition to eligibility restrictions is detailed in its Comments in response to the *Fourth Notice of Proposed Rulemaking* ("*Fourth NPRM*"). In those comments RTG also requested that the Commission make an exception for telephone companies serving rural areas if the Commission did impose restrictions on LEC in-region eligibility.

suburban areas in conformance with the mandate of Section 309(j) of the Communications Act of 1934, as amended ("the Act").

Contrary to WebCel's argument, aftermarket partitioning alone will not afford rural telephone companies an opportunity to acquire LMDS spectrum or to insure that LMDS is rapidly deployed to rural America. As RTG has previously and repeatedly warned the Commission, many licensees are unwilling to partition because they ultimately intend to sell their systems to a larger operator and do not want to carve up the license area.<sup>4</sup> RTG has found licensees in other services, such as Personal Communications Services ("PCS") and Multipoint Distribution Services ("MDS"), generally uninterested in consummating partitioning deals.

By precluding rural telephone companies from providing LMDS in their wireline service areas, the Commission is already walking a fine line in balancing Section 309(j)'s dictate that the FCC facilitate widespread dissemination of wireless licenses against its competing requirement that the Commission facilitate the provision of wireless telecommunications services by rural telephone companies to rural areas. Any further restriction on a rural telephone company's eligibility to participate in the auction of in-region BTAs would plainly violate the requirements of Section 309(j). Rural telephone companies will most likely be able to participate in the provision of LMDS in their own markets and in markets adjacent to their current wireline service areas if they are given the opportunity to obtain licenses through the auction process. This can best be accomplished by permitting a rural telephone company to acquire an in-region BTA and

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<sup>4</sup> See, RTG's Comments and Reply Comments in response to Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees; Implementation of Section 257 of the Communications Act--Elimination of Market Entry Barriers, *Notice of Proposed Rulemaking*, WT Docket 96-148, GN Docket No. 96-113 ("PCS Partitioning NPRM").

divest any significantly overlapping area.<sup>5</sup> By denying a rural telephone company an opportunity to participate in auctions for areas covering and adjacent to the rural telephone company's wireline service area, WebCel's request would effectively deny rural telephone companies a viable opportunity to participate in LMDS. Such a limitation is clearly contrary to Congress's mandate that rural telephone companies be afforded opportunity through the competitive bidding process to provide new and innovative spectrum-based services.

Any further restriction on a rural telephone company's eligibility would also negatively impact competition in rural markets. As RTG and many other commenters correctly stated in their comments in response to the *Fourth NPRM*, in rural areas, the incumbent rural telephone company or cable operator may be the only seriously interested and best provider of LMDS.<sup>6</sup> The Commission's current in-region eligibility restrictions prohibit these incumbents from providing service in their wireline or franchised areas. Incumbent operators can provide LMDS in *adjacent* markets, however, and will prove to be the most likely provider of LMDS and the best source of competition in these rural areas. For example, a rural telephone company will be able to offer LMDS in an adjacent market to compete with an adjacent provider of either video or telephony. By denying rural telephone companies and cable operators eligibility to participate in the auction for in-region BTAs, and thus effectively denying them the opportunity to provide service not only within their own wireline or franchised service areas but also within adjacent

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<sup>5</sup> Due to the "significant overlap" criteria, it may be possible for rural telephone companies to acquire BTA licenses without having to partition and divest. See 47 C.F.R. 101.1003(d). The Commission noted this fact as a justification for refusing to adopt a rural exemption to the general LEC in-region eligibility restriction. *Second R&O* at ¶180.

<sup>6</sup> See Comments of the National Telephone Cooperative Association ("NTCA") at 3; Comments of U S West, Inc. ("U S West") at 4; Comments of the United States Telephone Association ("USTA") at 6.


markets, the Commission would remove the best potential competitive providers of LMDS in rural areas, thereby denying the benefits of competition to rural populations.

### **Conclusion**

Partitioning alone does not provide rural telephone companies with adequate opportunity to acquire LMDS spectrum. Instead, rural telephone companies must be given a chance to acquire LMDS licenses to provide service to areas within and adjacent to their wireline service areas. Section 309(j) of the Act requires that rural telephone companies be allowed to participate in the LMDS auction, in recognition of the fact that participation by rural telephone companies will benefit Americans residing in rural areas by increasing competition and speeding LMDS to rural areas. Accordingly, the Commission should impose no further restrictions on rural telephone company participation in the LMDS auction.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I, Melissa M. Fistner, an employee in the law firm of Bennet & Bennet, PLLC, hereby certify that a copy of the foregoing Reply Comments of the Rural Telecommunications Group has been served on the following via first-class, postage pre-paid U.S. mail, this 6th day of May 1997:

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